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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JILBRAUN DANDTON AGNEW,

Defendant and Appellant.

D056495

(Super. Ct. No. SCD220189)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. (Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed, and remanded with directions.

A jury found Jilbraun D. Agnew guilty of assault by means likely to produce great bodily injury and battery with serious bodily injury for punching Steven Sevier outside of a liquor store.

On appeal, Agnew first claims that the prosecutor engaged in misconduct by asking a question in violation of the court's in limine ruling, and although the court sustained an objection to the question, it was still prejudicial. Agnew also claims that the court abused its discretion in admitting evidence of Agnew's prior acts that constituted improper and unduly prejudicial character evidence. Finally, Agnew claims, and the Attorney General agrees, the abstract of judgment must be amended to accurately reflect the jury's findings.

We agree and remand to the trial court to correct the abstract of judgment. We will reject Agnew's other contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts and Charges

On March 25, 2009, Steven Sevier walked toward the exit of Idaho Market, a liquor store in North Park, after purchasing a cigar. He saw Jilbraun Agnew, an acquaintance of Sevier's from the neighborhood, approaching. Sevier turned his head back as the store clerk, Firas Opar, wished him a good day. Sevier heard someone say, "Give me your wallet," and was then hit on the left side of the face. The blow knocked him backward into the store and caused him to lose consciousness. By the time he regained consciousness and stood to leave, Agnew had disappeared. Two days later Sevier went to the hospital, where he was diagnosed with a broken jaw. Several weeks later, Sevier's bone became infected and required surgery on his jaw.

After Sevier's first hospital visit, a doctor reported the incident to authorities. Sevier informed the responding police officer Agnew had hit him. Agnew was arrested.

B. Pretrial Statements and Motions

Upon arrest, Agnew waived his *Miranda*¹ rights. Detective Thomas Jacques interviewed him about the incident with Sevier, and recorded the interview. Agnew stated on the day in question he was outside Idaho Market but was not allowed in the store. He took out money so a friend could go into the store and buy him some water, and Sevier reached for the money. Sevier tried to hit Agnew while he struggled to hold onto his money, and Agnew swung back, making contact with Sevier's jaw, knocking him into the store. When Detective Jacques asked Agnew why he was not allowed in Idaho Market, Agnew explained the owner did not like him and others "hanging around" outside the store. Agnew recounted a time when the owner called the police and told them Agnew was breaking into cars and harassing customers.

Before trial, Agnew filed a motion in limine to exclude mention of a prior incident in which he hit his girlfriend in front of the Idaho Market. In opposition, the prosecution explained Opar had initially told investigating detectives he saw Agnew hit Sevier. However, Opar intended to testify at trial he did not see who punched Sevier, but only assisted the victim after the incident. The prosecution thus sought to use the prior incident involving Agnew's girlfriend, as well as evidence of Agnew's reputation in the community, to show the jury Opar changed his story out of fear of the defendant. The court agreed that the prosecution had a right to explain to the jury "everything except his reputation in the community." The court further explained that it would allow the

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

prosecutor to go into Opar's prior statement that he saw Agnew punch Sevier, but not into Agnew's "reputation and character."² The court did not explicitly address whether the prior incident involving Agnew's girlfriend went to his reputation or character.

C. Trial

1. The People's Case

At trial, the People called Opar, who testified he did not see who punched Sevier, he had not seen Agnew on March 25, and he did not recall telling Detective Jacques he saw Agnew hit Sevier. He further stated he was not afraid of Agnew and he did not recall telling the detective "people are afraid of reporting things, out of fear of retaliation." The prosecutor questioned Opar about the prior incident where Agnew struck his girlfriend. The court sustained the defense's relevance objection. The prosecutor also asked Opar if Agnew had been barred from shopping at Idaho Market. The court sustained the defense's relevance objection. Later on during the People's direct examination, Opar testified Agnew was a regular customer of Idaho Market and came into the store everyday. The prosecution subsequently asked Opar three more times whether Agnew was allowed to shop at Idaho Market. Each time, the defense objected on the grounds of relevance and the court sustained the objection.

² The court based its decision on Evidence Code section 1101, which provides: "(a) [E]vidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion. (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than his or her disposition to commit such an act."

At a sidebar conference, requested by the prosecutor, the court clarified its in limine ruling regarding Opar's testimony. The prosecutor expressed his understanding of the ruling that the court would allow him to bring up the prior incident involving Agnew's girlfriend to lay the foundation for Opar's inconsistent statements. The court explained that the People could question Opar regarding his prior statements to the detective that were inconsistent with statements he made at trial, including Opar's fear of retaliation if he reported the incident to police. The court would not allow questions regarding any prior incident, particularly the one involving his girlfriend, because those incidents went to Agnew's character. The defense moved for mistrial because the prosecutor had asked Opar about the incident involving Agnew's girlfriend. The court denied the motion noting Opar had not answered the question.

Later, Detective Jacques testified Opar stated in his initial interview that, on the night of March 25, he saw Agnew say something to Sevier and then punch Sevier. He additionally testified Opar said he feared retaliation if he reported this incident to police and he did not want to be a witness in this case.

2. The Defense Case

In order to set up Agnew's claim of self-defense, the defense twice brought up an alleged fight in which Sevier was involved earlier in the day on March 25. First, on cross-examination during the People's case, the defense asked Sevier if he had been involved in a fist fight with an acquaintance, Jarrett Bourne. Sevier denied being in that fight. Then, when Agnew took the stand during the defense case, he testified he saw Sevier involved in a fight with Bourne. Agnew then repeated a story similar to the one he

previously told Detective Jacques regarding the incident with Sevier. Sevier had instigated the fight by trying to take money from Agnew's hand and attempting to punch Agnew. Only then did Agnew hit Sevier. In the version of the story Agnew told at trial, however, unlike the story he told Detective Jacques, Agnew said he had taken out money so he could personally purchase beer from Idaho Market.

On cross-examination, the prosecution asked if Agnew was allowed in Idaho Market, this time with no objection. He repeatedly stated he was allowed in the store, and he planned on entering the store to buy himself beer. The prosecution then questioned Agnew about his statement, during his initial interview with Detective Jacques, that he took money out because he was not allowed in the store and wanted a friend to purchase water for him. When Agnew continued denying he was barred from entering the store, the prosecution asked Agnew about his prior statement to Detective Jacques that he was not allowed in the store because the owner of Idaho Market had accused him of "things," such as loitering in front of the store, and had called the police on him. Agnew denied the owner called the police on him, and insisted he was allowed in the store. Over objection on the ground of improper impeachment and lack of foundation, the court allowed the prosecution to play the entire tape recording of Agnew's interview with Detective Jacques.

The prosecution followed up on the tape recording by asking Agnew if he was banned from shopping in Idaho Market because he had been "hanging out" in front of the market and breaking into cars, as Agnew stated in his interview with Detective Jacques. The defense objected on relevance grounds to the mention of Agnew allegedly breaking

into cars, and the court overruled the objection. Agnew explained the owner of Idaho Market banned "JB" for breaking into cars and harassing customers outside the store, but "JB" referred to Jarrett Bourne, not Jilbraun (Agnew). He testified his statement to Detective Jacques was inconsistent with his testimony at trial because he was sick the day of the interview.

3. Jury Instructions and Verdict

Before the parties' closing arguments, the court instructed the jury, "Nothing that the attorneys say is evidence. . . . Their questions are not evidence." The court additionally instructed the jury that they could only use "evidence of statements that a witness made before the trial . . . [t]o evaluate whether the witness's testimony in court is believable [and] [a]s evidence that the information in those earlier statements is true." The jury found Agnew guilty of assault by means of force likely to produce great bodily injury and during the course of that offense inflicting great bodily injury within the meaning of both Penal Code³ section 1192.7, subdivision (c)(8) and section 12022.7, subdivision (a); guilty of battery with serious bodily injury, and during the course of that offense inflicting great bodily injury within the meaning of section 1192.7, subdivision (c)(8), and not guilty of attempted robbery. Agnew admitted two serious felony prior convictions (§ 667, subd. (a)(1)) and two strike priors (§ 667, subds. (b)-(i)). The court sentenced Agnew to a total term of 38 years to life.

³ All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

I

PROSECUTORIAL MISCONDUCT

Agnew asserts the prosecutor committed misconduct by asking Opar about the time Agnew punched his girlfriend in front of Idaho Market because the court had ruled evidence of that incident inadmissible under Evidence Code section 1101. Agnew further claims that question was prejudicial because it would suggest to the jury that Agnew had bad character. The Attorney General responds first that Agnew forfeited the claim of prosecutorial misconduct, alternatively that the prosecutor did not commit misconduct, and finally that the prosecutor's question was not prejudicial even if he committed misconduct by asking it. We agree with the Attorney General.

In order to preserve a claim of prosecutorial misconduct for appeal, the defendant must make a timely objection at trial and must request an admonition of the prosecutor, unless the admonition would not have cured the harm caused by the misconduct. (*People v. Tate* (2010) 49 Cal.4th 635, 687.) At trial, Agnew's counsel objected to the prosecutor's question only on relevance grounds. Because he failed to object on the appropriate grounds and request an admonition of the prosecutor, Agnew forfeited the claim of prosecutorial misconduct for appeal. Even so, we address the merits of his claim, and conclude the prosecutor did not engage in misconduct.

A prosecutor's conduct violates federal law if it " ' ' ' "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." ' ' ' " (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070 (*Wallace*), citing *People v. Earp* (1999) 20 Cal.4th

826, 858.) Under state law, prosecutorial misconduct occurs when the "prosecutor uses " ' ' ' "deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' ' ' ' ' ' (Wallace, *supra*, at p. 1070, citing *Earp, supra*, at p. 858.) However, to rise to the level of misconduct, the prosecutor's deceptive or reprehensible acts need not be intentional. (*People v. Hill* (1998) 17 Cal.4th 800, 822.) Upon a finding of prosecutorial misconduct, the prosecutor's behavior serves as the basis for the reversal of a conviction only if it is "reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839 (*Crew*).)

The prosecutor commits misconduct when " 'eliciting or attempting to elicit inadmissible evidence' in defiance of a court order." (*Wallace, supra*, 44 Cal.4th at p. 1071, citing *Crew, supra*, 31 Cal.4th 822, 839.) Even after *People v. Hill, supra*, 17 Cal.4th 800, removed any bad faith requirement to find prosecutorial misconduct, courts have used the absence of evidence "suggest[ing] the prosecutor *intentionally* elicited inadmissible evidence" as a basis for finding no prosecutorial misconduct. (*People v. Carrillo* (2004) 119 Cal.App.4th 94, 100, italics added.)

Agnew claims the prosecutor committed misconduct because he attempted to elicit evidence that Agnew punched his girlfriend in front of Idaho Market, evidence Agnew claims the court ruled inadmissible under Evidence Code section 1101. When ruling on the defense in limine motion to exclude the incident involving Agnew's girlfriend, the court did not explicitly grant or deny the motion. Rather, the court responded to the prosecutor's expressed desire to question Opar about that incident to

inform the jury of the reason behind Opar's inconsistent statements. The court explained the prosecutor could go into "everything" except his reputation in the community, and later added the prosecutor could not go into Agnew's character. The court did not, however, initially clarify its position that the incident involving Agnew's girlfriend went to Agnew's character. Only at sidebar after the prosecutor asked Opar the question did the court explain its view that the incident went to Agnew's character.

The prosecutor's question about the prior incident in which Agnew allegedly punched his girlfriend involved a genuine misunderstanding of the court's ambiguous in limine ruling, not prosecutorial misconduct involving deceptive or reprehensible methods. A court may find prosecutorial misconduct even when the prosecutor did not have a bad faith intention in his or her actions. Even so, a good faith misunderstanding by the prosecutor of a court's ruling may prevent the prosecutor's acts from being considered misconduct. Here, the prosecutor appears to have genuinely believed the court ruled the evidence regarding the prior incident admissible, a belief he demonstrated at the sidebar conference he requested. By asking Opar that question, he thus did not attempt to elicit inadmissible evidence, but rather attempted to elicit what he believed to be admissible evidence according to the court's ruling. After the court clarified it would exclude evidence of the incident involving Agnew's girlfriend, the prosecutor did not question any witness about that incident.

The record indicates the prosecutor's understanding of the court's in limine ruling was reasonable given the language used by the court and considering Evidence Code section 1101. The prosecutor explained to the court his intention to use evidence of the

incident involving Agnew's girlfriend to explain Opar's inconsistent statements and Agnew's reputation in the community. After the prosecutor gave that explanation, the court responded it agreed that "everything" the prosecutor intended to use was admissible except evidence of Agnew's reputation. The court later added character evidence was also inadmissible, as provided by Evidence Code section 1101, subdivision (a), suggesting Agnew's prior acts would not be admissible as an attempt to prove Agnew's propensity to commit the crime in question. However, subdivision (b) of that section allows evidence of prior acts for purposes other than demonstrating character. Given that exception and the court's statement that it agreed with the prosecutor as to everything except reputation, the prosecutor's interpretation of the court's ruling was reasonable. A reasonable misunderstanding of the court's ruling does not rise to the level of deceptive or reprehensible conduct.

Finally, the prosecutor's question to Opar about the prior incident in which Agnew punched his girlfriend in front of Idaho Market was not prejudicial. As the court pointed out, Opar did not answer the question. Before deliberation, the court instructed the jury that the lawyers' questions are not evidence. We assume the jury followed that instruction and declined to consider the question in finding the facts of this case. As a result, even if the prosecutor's question did constitute misconduct under state law, the prosecutor's act would not warrant reversal. Because the jury presumably did not consider the question in finding his guilt, Agnew could not have expected a more favorable result had the prosecutor avoided asking the question. Additionally, because the prosecutor's question did not prejudice Agnew, the prosecutor's conduct did not

"infect the trial with unfairness" such that Agnew was denied due process under the Fourteenth Amendment.

II

ADMISSION OF IMPROPER CHARACTER EVIDENCE

Agnew next claims the court erred by allowing the prosecutor to question Agnew about previously breaking into cars in front of Idaho Market. He argues evidence regarding that incident was improper character evidence under Evidence Code section 1101 and unduly prejudicial under Evidence Code section 352. However, to preserve our review of improper character evidence, counsel must object on that ground at trial. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1117 ["Counsel's objection to this testimony on the sole ground of relevance, however, did not preserve for appeal his present contention that the testimony was improper character evidence"].) Similarly, counsel's objection on relevance grounds does not preserve for appeal the issue of undue prejudice under Evidence Code section 352.⁴ (*People v. Barnett* (1998) 17 Cal.4th 1044, 1130.) Because Agnew's counsel objected only on relevance grounds to the prosecutor's questions about when Agnew broke into cars, Agnew forfeited his appeal on improper character evidence and undue prejudice grounds. Predicting we would determine those claims forfeited, Agnew asserts his counsel provided ineffective assistance by failing to object to these questions on grounds of improper character evidence and undue prejudice.

⁴ Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice."

Before turning to his ineffective assistance of counsel claim, we address the merits of Agnew's claim that the evidence regarding Agnew loitering in front of the store and breaking into cars was improper character evidence and unduly prejudicial. We review the trial court's ruling under Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) A trial court abuses its discretion when deciding whether to admit evidence only when it acts in an "arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) If the trial court did not abuse its discretion in admitting the evidence, "defendant's contention that his trial counsel's 'failure to assert the proper objection [under Evidence Code sections 352 and 1101, subdivision (a)] constitutes ineffective assistance of counsel' necessarily fails." (*People v. Carter* (2005) 36 Cal.4th 1215, 1257, fn. 29.)

The trial court did not abuse its discretion in admitting evidence that the owner of Idaho Market accused Agnew of breaking into cars in front of the store. That evidence was admissible impeachment evidence under Evidence Code section 780,⁵ not inadmissible character evidence. During the defense case, Agnew testified on direct that he took money out to enter the store and purchase beer. On cross-examination, Agnew again denied being banned from the store. The prosecutor then questioned Agnew about

⁵ Evidence Code section 780 states: "[T]he court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including: [¶] . . . [¶] (h) A statement made by him that is inconsistent with any part of his testimony at the hearing."

his prior statements to Detective Jacques that he took money out because he could not go into the store. When Agnew responded he did not recall that statement, the prosecutor brought up Agnew's prior statement that the owner did not like his habit of loitering in front of the store and the owner had accused him of "things" and called the police. After the prosecutor played the tape of the interview, on which Agnew discussed the owner of Idaho Market accusing him of "hanging around," breaking into cars, and harassing customers, the prosecutor questioned Agnew about breaking into cars and Agnew mentioned the owner accusing him of harassing customers.

Whether Agnew was allowed in Idaho Market was an integral part of Agnew's claim of self-defense. In his story to Detective Jacques, he used his being banned from the store to explain why he had money in his hand and thus why Sevier would attack him. He explained in detail why he was not allowed in the store. At trial, Agnew chose to testify and then changed his story about the incident, claiming he took money out to enter the store and buy himself beer. Under Evidence Code section 780, the prosecution had the right to question Agnew about his prior inconsistent statements to convince the jury Agnew should not be believed. The court thus did not abuse its discretion in allowing the prosecutor to play the tape and cross-examine Agnew regarding these statements.

The court additionally did not abuse its discretion in deciding discussion of the alleged prior incidents did not create a danger of undue prejudice that substantially outweighed the probative value of the statements. The court's limiting instruction, informing the jury it may use prior statements only to evaluate the believability of the witness's statements both in court and out of court in the earlier instances, minimized or

eliminated any potential prejudice caused by evidence on the possibility that Agnew broke into cars and harassed customers. Agnew took the stand, putting his credibility in issue. He made opposite statements before trial and during trial. The purpose of Evidence Code section 780, subdivision (h) is to expose the untruthfulness of testifying witnesses, and the prosecutor used the evidence at issue to do just that. Evidence of the inconsistent statements thus were probative regarding his credibility. Given the substantial probative value and the limiting instruction that minimized or eliminated any prejudice resulting from those statements, the court did not abuse its discretion by deciding that the level of prejudice of those statements, if any, did not substantially outweigh the probative value of the statements.

As the court properly allowed for impeachment purposes the prosecutor's questions about Agnew's stated reason for not being allowed in Idaho Market, Agnew's trial counsel did not provide ineffective assistance by failing to object on the ground of improper character evidence. Likewise, because that evidence was not unfairly prejudicial, Agnew's counsel did not provide ineffective assistance by failing to object on that ground.

III

ABSTRACT OF JUDGMENT

Finally, Agnew asserts, and the Attorney General correctly agrees, the abstract of judgment must be corrected to remove the section 12022.7, subdivision (a) allegation from count 2. The People did not charge, nor did the jury find, that allegation with regard to the battery with serious bodily injury count.

DISPOSITION

The judgment is affirmed. The case is remanded with directions to the trial court to amend the abstract of judgment consistent with this decision and forward it the Department of Corrections and Rehabilitation.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.